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No. 05-1551

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SUPREME COURT, U.S.

In the
Supreme Court of the United States

FLONA HEIDEMAN, et al.,
Petitioners,

v.

SOUTH SALT LAKE CITY,
a Utah Municipal Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF SOUTH SALT LAKE CITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that the City's prohibition on nude conduct in sexually oriented businesses serves a substantial government interest under *United States v. O'Brien*, 391 U.S. 367 (1968) and its progeny.

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COUNTERSTATEMENT OF THE FACTS

Since 1990, the City of South Salt Lake has regulated sexually oriented businesses ("SOBs") to control the negative secondary effects associated with such establishments. Its ordinances have been periodically reviewed and revised to accomplish this goal and to ensure conformity with developing case law. The most recent review began in late 1999. *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1185 (10th Cir. 2003) (*Heideman I*) (*see* Pet. App. 22, 26).

From 2000 to 2001, the City researched relevant case law and compiled numerous secondary effects reports, land use studies, police records, and public health reports concerning the negative secondary effects of sexually oriented businesses. 348 F.3d at 1186 & n.5; *see* (Pet. App. 27-28). The City identified various secondary effects, including lewd and lascivious conduct, prostitution, unsanitary conditions, and risk of spreading venereal diseases. (Pet. App. 3-4).

The City based its findings and conclusions on a number of sources cited in the Ordinance, including findings incorporated in decisions of the U.S. Supreme Court, state and federal trial and appellate courts, numerous secondary effects reports from other municipalities, and raw data from the City's police department and others. (Pet. App. 27-28 & n.5) (citing, *inter alia*, *California v. LaRue*, 409 U.S. 109, 111 (1972) (identifying lewd conduct and sexual assaults associated with nudity in sexually oriented businesses); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (1991) (Souter, J., concurring) (citing examples of prostitution rings run out of nude clubs); and *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97 (2000) ("Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in [prior adult business cases], it was reasonable for

Erie to conclude that such nude dancing was likely to produce the same secondary effects."); *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1213 (10th Cir. 1990) (upholding revocation of "adult theater" license for 65 "citations . . . issued for a wide variety of public sex acts including masturbation, fellatio and sexual intercourse")).

Consistent with myriad cases, the secondary effects reports compiled by the City document similar harms. Numerous cities included live nude conduct establishments in their studies documenting the adverse impacts of sexually oriented businesses. Additionally, several of the reports document the problems of nude conduct in particular. (Pet. App. 20-21, 28 n.5).

The City Council introduced Ordinance 2001-04 during a public meeting on February 21, 2001. (Pet. App. 14). Prior to the meeting, each City Council member had received a 21-page summary of numerous secondary effects reports included in the legislative record. At the meeting, petitioners' counsel submitted documents and made statements opposing the ordinance; similarly, numerous citizens, including a former nude dancer and her mother, made statements supporting the ordinance. (Pet. App. 14-15). The City Attorney and the City's outside counsel also spoke, summarizing the law and the negative secondary effects. *Id.* At the conclusion of the meeting, the Ordinance was tabled until a future work meeting.

On April 25, 2001, the South Salt Lake City Council enacted the Ordinance 2001-04 ("the Ordinance"). (Pet. App. 15). Among other things, the Ordinance added certain procedural protections for sexually oriented businesses and greatly expanded the legislative record incorporated into the Ordinance. The Ordinance was signed by the Mayor on May

2, 2001, and [illegible]odified as Chapter 5.56 of the City's Code. (Pet. App. 15). Contrary to the assertion at page 3 of the petition, the Ordinance was not "aimed specifically at the erotic message" of petitioners but rather at the negative secondary effects associated with sexually oriented businesses and nude conduct in those businesses. (Pet. App. 15).

The Ordinance prohibits nudity—by both patrons and employees—on the premises of all sexually oriented businesses. (Pet. App. 2, 46) (§ 5.56.310(G) (employees) and § 5.56.320(C) (patrons)). Contrary to petitioners' misstatement that the "ordinance is aimed specifically at the erotic message," (Pet. 3), the nudity prohibition applies to both nude dancing and patron masturbation alike, *i.e.*, regardless of whether expression is occurring. A wide range of semi-nude erotic conduct is allowed, but an employee is required to wear nothing less than a "g-string" that covers the genitalia, anus, and anal cleft, and "pasties" that cover the female nipples. *Heideman I*, 348 F.3d at 1186 (*see* Pet. App. 26-27 & n.4).

COUNTERSTATEMENT OF PROCEEDINGS BELOW

The petitioners challenged the Ordinance, and the district court denied their motion for preliminary injunction, holding that "[t]he South Salt Lake ordinance requiring the use of G-strings and pasties in sexually oriented businesses does not limit expression." (Pet. App. 59).

On November 4, 2003, the Tenth Circuit affirmed the district court's denial of petitioners' motion for a preliminary injunction. (Pet. App. 22). The court held that the Ordinance's prohibition on nudity: (1) is within the City's police power to enact, (2) is, on its face, designed to serve a substantial government interest in preventing secondary

effects, (3) that prevention of secondary effects is unrelated to the suppression of free expression, and (4) that the "pasties and G-string" requirement is a *de minimis* restriction that "leaves ample capacity to convey the dancer's erotic message." *Heideman I*, 348 F.3d at 1197-1200 (*see* Pet. App. 49-57).

Noting that the case was before the court on appeal from a preliminary injunction proceeding, the court remanded the case for further development. *Id.* at 1200 (*see* Pet. App. 57).

On remand, the petitioners repeated essentially the same arguments that they presented to the City Council during the public hearing on February 21, 2001: (a) that much of the secondary effects evidence the City relied upon is, according to their expert, "unscientific," (b) that their particular local clubs are "upscale," and had not caused problems, and (c) that the Ordinance would "force" them to sell alcohol.[1]

During discovery, petitioners obtained – but never acted upon – an order permitting them to gather police data regarding sexually oriented businesses in the City. District Court Record Entry ("R.") 114. Without obtaining the data they claimed necessary, petitioners submitted a report, R. 132, Exh. D, prepared by their expert, Daniel Linz – a communications professor whose work has previously been submitted to the Court by the adult entertainment industry. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 300 (2000) (referring to Linz's study and reiterating that the Court has "flatly rejected" the idea that invocation of academic studies

[1] The argument that the ordinance "forces" any business to sell alcohol is patently false. What petitioners mean is that if they cannot offer full nudity, they will likely seek an alcohol license. This is irrelevant to the constitutionality of the ordinance at bar.

is sufficient to "cast doubt on the experience of the local government"). Linz's report acknowledges plaintiffs' failure to obtain certain data and states that the lack of data "severely limits our ability to answer the most important question concerning secondary crime effects" in South Salt Lake. R. 132, Exh. D, at 2.

The City also hired an expert, Richard McCleary, a criminology professor who not only concluded that the City's legislative record was more than sufficient to justify the secondary effects rationale of the City's ordinance, but also thoroughly critiqued Linz's methodology, including his reliance on police calls-for-service ("CFS"), which are not used by criminologists to measure crime. R. 139, Exh. C.

At the close of discovery, the City moved for summary judgment. On August 24, 2004, the district court issued an opinion and order granting the City's motion. (Pet. App. 13). The petitioners appealed to the Tenth Circuit.

After briefing and oral argument, the Tenth Circuit affirmed the grant of summary judgment to the City. (Pet. App. 1). The court held that evidence of secondary effects underlying the Ordinance was reasonably believed to be relevant to the City's rationale for regulating nude conduct in sexually oriented businesses. (Pet. App. 5-6). It also held that the petitioners' evidence did not cast direct doubt on the City's evidence and therefore did not shift the burden of proof back to the City so as to preclude a summary judgment. (Pet. App. 6).

The court of appeals stated that "[a]lthough Plaintiffs submitted evidence in rebuttal of other negative secondary effects cited by the City in its ordinance, such as diminished property values and crime, they presented no evidence

whatsoever that nude conduct does not result in unsanitary conditions, unlawful sexual conduct, or the transmission of sexually transmitted diseases." (Pet. App. 7).

In this statement, the Court of Appeals properly recognized that service of one substantial government interest is sufficient to justify a content-neutral regulation. *Cf. City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 435-36 (2002) (finding evidence concerning crime sufficient to justify zoning regulation although evidence concerning property values was inconclusive).[2]

The court also recognized the City was permitted to rely on evidence of conditions at various kinds of sexually oriented businesses to support its regulation of sexually oriented businesses as a category of establishments. (Pet. App. 7-8 n.1) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97 (2000) ("Because the nude dancing [at plaintiff's establishment] is of the same character as the adult entertainment at issue in *Renton [v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), namely, adult motion pictures], *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) [same], and *California v. LaRue*, 409 U.S. 109 (1972) [erotic dancing], it was reasonable for [the city] to conclude that such

[2] Because the secondary effects evidence most relevant to the nude conduct regulation – *i.e.*, evidence concerning illicit sexual behavior inside sexually oriented businesses – was unrebutted, the panel apparently concluded that it need not reach Dr. McCleary's expert report, which demonstrated the deficiencies of Dr. Linz's methodology and conclusions regarding ambient crime. The Tenth Circuit's characterization of petitioners' evidence, although unduly generous, did not change its sound conclusion that the City's legislative evidence satisfied *Renton* analysis and justified summary judgment.

nude dancing was likely to produce the same secondary effects.")).

The Tenth Circuit concluded that "Plaintiffs have not shown a genuine issue of material fact as to any of the four *O'Brien* prongs, and therefore the district court did not err in granting the City's motion for summary judgment." (Pet. App. 11).

REASONS FOR DENYING THE WRIT

The issue is whether the court of appeals correctly applied this Court's precedents when evaluating, under the First Amendment, the City's prohibition on complete nudity in sexually oriented businesses. Because the Tenth Circuit's decision is consistent with this Court's precedents and the relevant decisions of other courts of appeals, the petition for a writ of certiorari should be denied.

I. THE TENTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS.

The petition for a writ of certiorari should be denied because the Tenth Circuit's decision is consistent with this Court's precedents.

In *United States v. O'Brien*, 391 U.S. 367 (1968), this Court set forth the standard for evaluating restrictions on expressive conduct under the First Amendment:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the

> suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

The Court applied this standard in the adult business context in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). There, the Court considered a time, place, and manner regulation that required adult theaters to locate more than 1,000 feet from residential zones, dwellings, churches, parks, and schools. *Id.* at 46. The Court stated that "content-neutral" speech regulations—those that are justified without reference to the content of the regulated speech—"are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47-48.

With regard to whether the ordinance served a substantial governmental interest, the Court held that Renton was entitled to rely on the experiences of other cities and the findings summarized in judicial decisions about the secondary effects associated with sexually oriented businesses. *Id.* at 51-52. The Court stated the city was not required to rely on local studies, nor was it required to conduct new studies or to produce evidence independent from that produced by other cities. *Id.* Under *Renton*, a regulation satisfies the First Amendment "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.*

Five years later, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the Court applied *O'Brien* analysis to a state statute prohibiting public nudity when it was challenged on

First Amendment grounds by establishments that desired to provide totally nude dancing. 501 U.S. at 567 (plurality opinion); *id.* at 582 (Souter, J., concurring). Despite the lack of *any* legislative history or record evidence concerning secondary effects, the nudity ban in *Barnes* was upheld because it was justified by a current governmental interest in preventing the adverse impacts associated with nude dancing. *Id.* at 582-83 (Souter, J., concurring).

Relying on *Renton*, the controlling opinion in *Barnes* concluded that live nude dancing would likely produce the same negative secondary effects as the type of entertainment at issue in previous Court decisions (*i.e.*, *Renton*, *American Mini Theatres*, *LaRue*), and that the statute therefore served a substantial government interest in preventing such adverse effects. *Id.* at 584. The opinion agreed with "*Renton*'s recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects," and it held that regulating adult businesses due to their correlation with secondary effects is unrelated to the suppression of free expression. *Id.* at 584-86.

This Court's most recent nude dancing case is *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). In *Erie*, the Court applied *O'Brien* analysis and the evidentiary standard set forth in *Renton* to conclude that a ban on public nudity, which required erotic dancers to wear pasties and g-strings, furthered the government interest in preventing harmful secondary effects and did not violate the First Amendment. The court approved the city's reliance on previous judicial decisions that described the evidentiary basis for similar regulations. *Id.* at 296-97. It also recognized that the city's own secondary effects findings—unaided by extrinsic evidence—are sufficient in the absence of specific reason to doubt them. *Id.* at 297-98. Finally, the Court rejected the

idea that empirical analysis or academic studies are required for establishing a substantial government interest under *O'Brien*, holding that the government has a "freer hand" when regulating conduct. 529 U.S. at 299-300.

Finally, in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), the Court applied *Renton* (but not *O'Brien*) analysis to a unique zoning regulation prohibiting the combination of adult bookstore and adult arcade operations under one roof. The city contended that such combinations would have the same zoning-type secondary effects as the city had found, in an earlier study, to be associated with separate sexually oriented businesses clustered in a neighborhood. 535 U.S. at 430-31.

Los Angeles – which relied *solely* on its zoning study – admitted that it did not study the effects of "any separate-standing adult bookstore or arcade," let alone any "combination" establishments. *Id.* at 436. Although the district court and court of appeals granted summary judgment against the regulation for lack of specific evidence concerning "combination" businesses, this Court reversed, holding that the circuit court erred in "refus[ing] to allow the city to draw the inference that 'the expansion of an adult bookstore to include an adult arcade would increase' business activity and produce the harmful secondary effects" identified in the city's zoning study. *Id.* at 436-37 (quoting 222 F.3d 719, 726 (9th Cir. 2000)). The Court also explained that while a city must provide evidence supporting its own rationale, the city "does not bear the burden of providing evidence that rules out" alternative theories of secondary effects. *Alameda Books*, 535 U.S. at 437 ("The Court of Appeals simply replaced the city's theory . . . with its own . . . .").

Alameda Books clarifies that the latitude given cities to address secondary effects allows reliance on evidence of harm not directly on point with the regulation adopted, but nevertheless supportive of an inference justifying the regulation. It was in this context of relying on an inference that the plurality introduced a burden-shifting procedure—not to "appraise the wisdom of the City's decision," *Renton*, 475 U.S. at 52, but only to ensure that "the municipality meets the [reasonably believed to be relevant] standard set forth in *Renton*." *Alameda Books*, 535 U.S. at 438-39.

Justice Kennedy's concurrence stressed that a city cannot advance a content-based rationale, *i.e.*, that the city will reduce secondary effects because its regulation will force the closure of one or more adult businesses. *Id.* at 450-51. Rather, a city must "advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Id.* at 449. This is the "proposition [that] a city need[s] to advance in order to sustain a secondary-effects ordinance." *Id.*

Justice Kennedy agreed with the plurality that the city's inference, drawn from its zoning study, was reasonable. *Id.* at 450-52. He emphasized that cities need only rely on some evidence "reasonably believed to be relevant" when reaching legislative judgments concerning secondary effects, acknowledging that city councils are in a better position than the courts to make policy decisions affecting their municipalities. *Id.*

The Tenth Circuit faithfully applied these precedents when it affirmed summary judgment in favor of the City. It properly evaluated the evidence from the City and from petitioners within the *Alameda Books* framework to ensure

that "the municipality meets the standard set forth in *Renton*," 535 U.S. at 439, *i.e.*, that the City relies on evidence "reasonably believed to be relevant" to the secondary effects the City seeks to address. Consistent with this Court's on-point decisions in *Barnes* and *City of Erie*, the Tenth Circuit held that the City's extensive legislative record satisfied the *O'Brien/Renton* standard.

Petitioners' theory of the case proceeds along the false premise that *Alameda Books* worked fundamental changes in the deferential *Renton* standard and that localized secondary effects proof is now required. Petitioners complain that under the Tenth Circuit's ruling, cities "may rely on studies of other cities and their problems, even if the businesses are substantially dissimilar." (Pet. 9).

As an initial matter, it is well-settled that "legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (Souter, J., concurring in judgment) (following *Renton*, 475 U.S. 41, 51-52)). "All five Justices in the *Alameda Books* majority affirmed *Renton's* core principle that local governments are not required to conduct their own studies in order to justify an ordinance designed to combat the secondary effects of adult businesses. *See Alameda Books*, 535 U.S. at 438 (plurality opinion); *id.* at 451 (Kennedy, J., concurring)." *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1193 (9th Cir. 2004).

Moreover, petitioners' nude dancing establishment is not "substantially dissimilar" from the businesses in *LaRue*, *Barnes*, and *Erie*—all of which, like petitioner American Bush, Inc., offered nude or topless dancing as their principal enterprise. And while petitioners seek to require legislative

bodies to rely on evidence concerning businesses identical to those being regulated, the Tenth Circuit's ruling on this point flows directly from this Court's precedents establishing that adult entertainment in "adult motion picture theaters" is "of the same character" as adult entertainment in "adult cabarets" featuring nude dancing. (*See* Pet. App. 8) (quoting *Erie*, 529 U.S. at 296-97).

Petitioners' citation to affidavits—many of which lack the basic requirements for summary judgment evidence—concerning property values and their establishment's alleged compliance with prior regulations in South Salt Lake City is simply another iteration of its misplaced argument that the City must provide "localized proof" of secondary effects at specific addresses to regulate sexually oriented businesses as a category.

In any event, the Tenth Circuit properly observed that the affidavit of Hallard Cannon, president of American Bush, Inc., stated that dancers at his establishment were cited under the City's prior ordinance for "touching while performing," *i.e.*, suggesting "at the very least . . . that nude employees were either simulating masturbation or engaging in physical contact with patrons." (Pet. App. 8).[3] The panel found that both of these activities are reasonably related to the unlawful sexual activity and related conditions that the ordinance seeks to prevent. *Id.* This case involves no showing that, as it concerns secondary effects, petitioners are "different" from adult oriented businesses in general so the petitioners' assertion that the court of appeals erred in allowing the City

[3] This highlights one of several misstatements of fact made by petitioners, namely that petitioners "have always followed" the City's regulations. (Pet. 9).

to rely on evidence from substantially dissimilar businesses is without any foundation.

Several other misstatements of fact and law merit correction.

First, contrary to the petitioner's misstatement at page 8 of the petition, at no point did the Tenth Circuit label the petitioners' materials as "substantial rebuttal evidence tending to put the second and third prongs of the *O'Brien* test at issue." The court considered whether, under the *Alameda Books* framework, the petitioners' evidence cast direct doubt on the City's rationale for the ordinance, and concluded that it did not.

Second, petitioners misrepresent the City's argument and the Tenth Circuit's decision at page 9 of the petition, where they assert that the court "accepted the City's argument that it need not show" a correlation between negative secondary effects and sexually oriented businesses. As demonstrated above, the statement to the effect that the City need not show a correlation between the category of regulated businesses and secondary effects neither describes the City's position nor the Tenth Circuit's holding in this case.

Third, petitioners incorrectly assert at page 9 of the petition that "Defendant conceded that it had no evidence of unlawful conduct, sanitation problems or the transmission of disease in its Interrogatory Answers (Aplt. App. 501-513)." Petitioners' failure to cite to a specific page of the Interrogatory Answers is understandable, given that the Interrogatories did not specifically mention "sanitation problems or the transmission of disease." What the Interrogatory Answers do show is that in addition to extensive evidence documenting the adverse impacts of nude conduct in

sexually oriented businesses, the City's legislative record also included police reports and conviction records "show[ing] adverse incidents at sexually oriented businesses in the city, including, but not limited to: assaults and fights, harassment, burglary/theft from car, DUI, public intoxication, disorderly conduct, and lewdness." (Aplt. App. 506).

Fourth, petitioners incorrectly assert on page 9 that they "did, in fact, submit evidence on all the points referred to by the Court . . . ." On the contrary, petitioners offered the affidavit of a former lawyer for two of the City's sexually oriented businesses, in which the lawyer opined that "he would have been aware of any criminal convictions" associated with the businesses. (Aplt. App. 184). This assertion not only lacks foundation, but it wrongly assumes that all unlawful activity results in a criminal conviction. It obviously does not. *See Fantasy Ranch, Inc. v. City of Arlington*, No. 04-11337, 2006 WL 2147559, at *9-10 (5th Cir., Aug. 2, 2006) (noting that lack of arrests at adult cabaret "is likely of little comfort to the City of Arlington, which passed this ordinance at least in part because dancer-patron proximity in a dimly-lit room made such crimes difficult to police."). In short, the Tenth Circuit properly held that the City has a "clear interest" in preventing the unlawful sexual conduct and unsanitary conditions associated with nude dancing establishments, and that the minimal clothing requirements in the ordinance logically serve that interest. *City of Erie*, 529 U.S. at 300-01.

Finally, petitioners have no basis to assert, on page 10, that the City's ordinance dropped the requirement that entertainers provide proof they are free from contagious or communicable diseases "because experience has simply proved it unnecessary." It is more likely that the City eliminated the requirement out of constitutional privacy

concerns implicated by requiring the disclosure of medical records. In any event, petitioners' claim is an unsubstantiated misstatement of fact that has no bearing upon the case.

II. THE TENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE RELEVANT DECISIONS OF THE REMAINING COURTS OF APPEALS.

The Tenth Circuit's decision in this case is consistent with the relevant post-*Alameda* decisions of other courts of appeals. *See, e.g., Fantasy Ranch*, No. 04-11337, 2006 WL 2147559 (rejecting evidentiary challenge as insufficient to shift evidentiary burden back to legislative body); *Gammoh v. City of La Habra*, 395 F.3d 1114 (9th Cir. 2005); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003); *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003); *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003).[4]

The Seventh Circuit applied *Alameda Books* in *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003), to an ordinance that prohibited the sale, use, or consumption of alcohol on the premises of sexually oriented business. Like South Salt Lake City in this case, the village in that case relied on numerous judicial decisions, studies from 11 different cities, and other secondary effects reports to support its conclusion that adult establishments are associated with adverse secondary effects. *Id.* at 725. The Seventh Circuit

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[4] Indeed, the decisions in *G.M. Enterprises*, *SOB, Inc.*, and *Gammoh* all reject Dr. Linz's opinion as insufficient under governing law. State appellate decisions are in accord. *See City of Elko v. Abed*, 677 N.W.2d 455 (Minn. Ct. App. 2004); *Charter Twp. of Van Buren v. Garter Belt, Inc.*, 673 N.W.2d 111 (Mich. Ct. App. 2004).

rejected the bar's argument that the village had to conduct its own studies of local conditions to support the regulation, and it held that the evidentiary record fairly supported the proffered rationale for the ordinance. *Id.* at 725-26.

The Seventh Circuit also applied *Alameda Books* in *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003), where the ordinance at issue prohibited the sale of alcohol and imposed a stage height/proximity buffer between dancers and patrons in establishments where nude erotic dancing occurs. The local government relied on studies from other communities that demonstrated a correlation between sexually oriented businesses and negative secondary effects, as well as judicial decisions and police report to the same effect. *Id.* at 633-35. The business presented its own study – by Dr. Linz – that criticized the town's studies and evidence that allegedly showed that property values and crime were not negatively impacted by it. *Id.* 635-36.

The *G.M. Enterprises* court held that the business's evidence showed that the town could have reached a different reasonable conclusion about secondary effects and adult businesses, but the evidence was nevertheless insufficient "to vitiate the result reached in the Board's legislative process." *Id.* at 639. The court rejected, as "completely unfounded," Dr. Linz's argument that secondary effects reports must demonstrate a causal relationship and be sufficiently methodical to be admissible under the *Daubert* evidentiary standard. *Id.* at 640.

In *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003), the Eighth Circuit applied *Alameda Books* and *Renton* to a public indecency ordinance that required erotic dancers to wear pasties and g-strings. The county relied on studies from other municipalities and other evidence of adverse

secondary effects associated with adult businesses. *Id.* at 862. The business countered with evidence that it did not negatively impact crime rates or property values during its nearly eight years in business, as well as with an article that criticized the secondary effects studies relied upon by other municipalities. *Id.* at 862-63. The Eight Circuit noted that the business's evidence did not relate to the secondary effects most relevant to nudity regulations. *Id.* at 863-64. Because the business did not cast direct doubt on the county's rationale for its nudity regulation, the Eight Circuit affirmed summary judgment for the county. *Id.* at 864.

The Ninth Circuit is also in agreement. In *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004), the court considered the city's zoning regulation for adult businesses (requiring 6 of them to relocate), and held that the business's land use report criticizing the city's evidence was insufficient to overcome summary judgment because it ignored certain categories of the city's evidence altogether *Id.* at 1195-96 ("Again, however, World Wide failed to present an effective rebuttal to an entire category of evidence: the public testimony. . . . This failure to cast doubt on Spokane's justification for the Ordinances dooms World Wide's challenge.").

In *Gammoh v. City of La Habra*, 395 F.3d 1114 (9th Cir. 2005), the court rejected Dr. Linz's opinion—the exact opinion given here, *see* R. 132, Exh. D at 7—that only systematic and methodological analysis of police calls-for-service ("CFS") data could support the City's regulation of adult cabarets. The Ninth Circuit stated: "This is simply not the law. 'So long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses[,]' it is sufficient to support the Ordinance." 395 F.3d at 1126; *see also id.* at 1127 (citing *Alameda Books* and

concluding: "While we do not permit legislative bodies to rely on shoddy data, we also will not specify the methodological standards to which their evidence must conform."). The court held that the city's studies were unquestionably relevant to its rationale because they addressed secondary effects of a variety of adult businesses (the category of establishments affected by the ordinance), that the city was not required to obtain research targeting the exact activity it wished to regulate, and that summary judgment for the city was appropriate. *Id.* at 1127-28.

Petitioners assert at page 10 of the petition that there is "a split in the Circuits as to the kink [sic], quantity, and quality of rebuttal information which is necessary in order to avoid summary judgment for the Defendant municipality." They principally rely on *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), which concluded that the plaintiffs' voluminous evidence addressed each secondary effect targeted by the government and warranted a remand for the district court to evaluate the evidence under *Alameda Books*, which was decided after the district court entered its judgment. *Id.* at 1272-73.

While the City contends that the *Peek-A-Boo* decision is flawed – it appears to require, contrary to this Court's precedents, local evidence of secondary effects and a "battle of competing experts" – the decision is nevertheless distinguishable from this case and the others cited above because the Eleventh Circuit concluded that the business's evidence sufficiently disputed every kind of evidence the county relied upon in enacting its ordinance. In contrast, the Fifth, Seventh, Eighth, Ninth, and (in this case) Tenth Circuits have held that the local government's supporting secondary effects evidence was reasonably believed to be relevant to its rationale for the ordinance and, on at least

some significant issue, unchallenged by the evidence presented by the adult businesses. This indicates no split among the circuits, but rather different outcomes based on different underlying facts.

Consequently, the consistency between the Tenth Circuit's decision with the decisions of other circuits provides another reason for denying the writ.

CONCLUSION

The Tenth Circuit's decision in this case is consistent with this Court's precedents and those of other federal circuits. The City's nudity prohibition, like those upheld by this Court in *Barnes* and *Erie*, serves a substantial government interest in preventing negative secondary effects. This Court should deny the petition for a writ of certiorari.

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Respectfully submitted,

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